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September 24, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: May 31, 2007

Case Number: TSO-0500

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") for access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that access authorization should not be restored in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a notification letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created a substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the notification letter included a statement of the derogatory information causing the security concerns.

The letter cites a January 23, 2007 report by a DOE consultant psychiatrist (consultant psychiatrist) who diagnosed the individual as suffering from "pathological gambling," a mental condition which causes or may cause a defect in judgment or reliability. The letter

¹/ Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

also notes that in December 2004, the individual used his government credit card to withdraw \$1700 in one day in order to finance his gambling. According to the notification letter, this diagnosis raises a security concern under 10 C.F.R. § 710.8(h)(Criterion H).

The letter also indicates that the individual has been diagnosed by the consultant psychiatrist as an abuser of alcohol. The letter further cites several alcohol-related arrests of the individual, which also involved motor vehicle use. One of these was an arrest for driving while intoxicated (DWI), which took place on June 20, 2006. According to the letter, these facts give rise to a security concern under 10 C.F.R. § 710.8(j)(Criterion J).

Moreover, the letter indicates that the individual stated in a Personnel Security Interview (PSI) of November 14, 2006, that he did not gamble on June 21, 2006, at a local casino, yet he admitted in his psychiatric evaluation with the consultant psychiatrist that he did gamble at that time.² According to the letter, this is a falsification, and represents a security concern under 10 C.F.R. § 710.8(f)(Criterion F).

The notification letter informed the individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual testified on his own behalf, and presented the testimony of his mother, his father, and a former co-worker/friend. The DOE Counsel presented the testimony of the DOE

2/ In the PSI, the individual stated that this casino incident took place on June 21, 2006. He also indicated that after the casino incident he attempted to drive home in an intoxicated state, and was arrested for DWI. PSI at 6-13. However, the police report states that the arrest took place on June 20, 2006. DOE Exh. 10. In an E-mail of June 30, 2006, the individual reported to the DOE that he was arrested on June 20, 2006, for DWI. DOE Exh. 9. I will assume that in the PSI, the individual misstated the date of the casino/DWI event. Accordingly, for purposes of this proceeding, I will consider the entire casino/DWI event to have taken place on June 20.

consultant psychiatrist. At the hearing, the individual presented some records showing attendance at Alcoholics' Anonymous (AA) meetings and Gamblers' Anonymous (GA) meetings. Individual's Hearing Exhibits 1-3. At the hearing, he also presented for inspection a "Plea and Disposition Agreement" and "Judgment," dated December 14, 2006, which related to the June 2006 DWI.³

II. Hearing Testimony

A. The Individual

The individual has been living with his parents for a number of years, since he returned from the military. He admits that he used very poor judgment on the evening of June 20, 2006, when he gambled at a local casino, used alcohol and then attempted to drive home, whereupon he was cited for DWI. Transcript of Hearing (Tr.) at 76. With respect to his alcohol use, the individual testified that he has abstained from alcohol since approximately June of 2007. He indicated that he no longer goes to "happy hours" and does not use the alcohol in his home. He stated that he has attended several alcoholics anonymous meetings since June 2007. Tr. at 68-85; Individual's Hearing Exhibit 1.

The individual also testified about his gambling. He admitted that he used a government credit card to finance casino gambling in 2004, and that his mother paid off the \$1700 debt for that expense. He recognized that he used poor judgment. Tr. at 93. He stated that he had had some Employee Assistance Program counseling shortly thereafter for this gambling problem. Tr. at 96-97. He stated that he engaged in no casino gambling between 2004, and the evening of June 20, 2006, the night of the casino/DWI incident. He also testified that he has not engaged in any gambling since June 2006, except for the purchase of several one-dollar lottery tickets. He indicated that he only buys lottery tickets if the prize is at least \$100 million. Tr. at 98. He testified that he has attended several Gamblers' Anonymous (GA) meetings in the last several months, but has no sponsor. Tr. at 99. Individual's Hearing Exhibit 3. He believes he has a gambling problem, but stated that he has no urge to gamble, as long as he stays away from casinos. Tr. at 102. He

3/ The document inspected at the hearing is the individual's personal copy. Accordingly, it was not entered into the record of the case. It is reproduced as DOE Exhibit 11. However, the "Judgment" section of Exhibit 11 is illegible.

plans to attend a veterans' addiction group for some additional counseling on gambling. Tr. at 110.

The individual also discussed his false statement in the PSI that he had not gambled at the casino on June 20, when in fact he had. In this regard, he indicated that he had forgotten about the gambling incident, but remembered it by the time he had his interview with the DOE consultant psychiatrist. Tr. at 68, 112-114.

B. Individual's Mother and Father

The individual's father testified that the individual has lived at home with his parents for the last 10 or 15 years. He stated that the individual usually drinks cola drinks, and he does not believe that the individual has an alcohol problem. He stated that there is liquor in the house, but has seen the individual drink only one beer or so at parties. Tr. at 11-14. He further indicated that he believes that the individual has been stopped for traffic offenses, not because he has been intoxicated, but simply because he is a bad driver. Tr. at 12.

The individual's father does believe that the individual has had a gambling problem. He noted in this regard that the individual had used his government credit card to finance his gambling, and had borrowed money from his mother to repay that debt. He stated that the individual has ceased gambling, except for purchasing one-dollar lottery tickets. Tr. at 16-30.

The individual's mother does not believe that the individual has any problems with alcohol use. She believes his last use of alcohol was in December 2006 on New Year's eve. She stated that she is at home virtually all the time that the individual is at home and would therefore be aware if he were using alcohol at home. She stated that he has gone to several AA meetings recently. Tr. at 36-41. She indicated that he no longer goes to happy hours. Tr. at 47.

With respect to gambling, the individual's mother testified that he had a problem with gambling several years ago, and that she paid off gambling debts that were charged on his government credit card. She believes that several years ago he was spending a lot of time gambling at casinos. She is not sure about when he last gambled. She indicated that if he now resumes going to casinos, she would no longer permit him to live at home. She indicated that he has not had any financial problems this year, and has not had to borrow money from her. Tr. at 42-48.

C. Individual's Friend/Co-worker

This witness has known the individual for about 6 years. They used to work together, although they do not currently do so. Currently, she sees the individual irregularly. In the past, they socialized several times a month at "happy hours." She indicated that on those occasions the individual would have a couple of beers, but that she never saw him intoxicated. She stated that she has not been to a happy hour with the individual this year. She stated that she has been on business trips with the individual when he has been the designated driver, so he used no alcohol. She does not believe he has an alcohol problem. She has seen the individual at gambling casinos occasionally, but was not sure about the date of the last time she saw him there. She was not aware that the individual has any problem with gambling. Tr. at 54-63.

D. The DOE Consultant Psychiatrist

After listening to the testimony of all the above witnesses, the DOE consultant psychiatrist confirmed that he diagnosed the individual with alcohol abuse and pathological gambling. However, based on additional information, he revised his diagnosis with respect to alcohol abuse. He stated that while it seems clear that the individual's June 2006 traffic citation was alcohol-related, the other two citations, arising in 1993 and 1988, appear less so, especially given the father's testimony that the individual is a poor driver. The consultant psychiatrist also pointed out that the two earlier alcohol-related citations are "far removed." The key factor for the consultant psychiatrist in revising his alcohol diagnosis was that the individual was not violating the terms of his 2006 DWI probation by using alcohol. This was confirmed by the individual's copy of the Judgment portion of his plea agreement, referred to in Note 3 above. The DOE consultant psychiatrist testified that while it would be prudent for the individual to abstain from alcohol, it is not required, and that there is no diagnosable alcohol problem for which the individual currently needs rehabilitation. Tr. at 126-134.

However, the consultant psychiatrist did confirm his earlier diagnosis that this individual suffers from a pathological gambling disorder. He believed that the individual's continuing to purchase lottery tickets is a form of gambling. He testified that in order to rehabilitate from this condition, the individual should abstain from gambling for a year and enroll in a therapy program. The consultant psychiatrist believed that GA would be suitable, but that there are other programs that would also be suitable. He testified

that June 2007 would be an appropriate date from which to measure the beginning of that one-year abstinence period, because that coincides with the individual's last purchase of a lottery ticket and with his first GA attendance. Tr. at 135-142.

With respect to the individual's falsification during the PSI, the consultant psychiatrist testified that the individual may have talked to him about the events at the casino on June 20, 2006, because the psychiatrist asked the "right question," and also because over time the individual may have been able to be more frank about his problem. The consultant psychiatrist testified that as the individual resolves his gambling problem, the falsification problem will also be resolved. He indicated that in this type of case there is a "thin line" between denial and lying. Tr. at 144-46.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. *Personnel Security Hearing* (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain,

extenuate or mitigate the allegations. *Personnel Security Hearing* (VSO-0005), 24 DOE ¶ 82,753 (1995), *aff'd*, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

The first issue in this case is whether the individual has mitigated the Criterion J security concerns by demonstrating that he is reformed and/or rehabilitated from his alcohol abuse. A further issue is whether the individual has mitigated the Criterion F concerns regarding his falsification at the PSI regarding his gambling. Finally, I must consider whether the individual has resolved the Criterion H concerns involving his pathological gambling, as diagnosed by the DOE consultant psychiatrist.

A. Criterion J

I find that the Criterion J concerns have been mitigated. I base this conclusion chiefly on the revised diagnosis of the DOE consultant psychiatrist. Specifically, the consultant psychiatrist testified that information at the hearing confirming that the individual was not violating the terms of his probation by using alcohol was a key factor in the revised diagnosis. The "Judgment" portion of the "Plea and Disposition Agreement" in this case establishes that the individual was not required to abstain from alcohol during his probationary period. Tr. at 155-56. I also believe, based on the testimony of the other witnesses in this case, that the individual is a moderate alcohol user, and that the 2006 DWI citation was aberrational. Based on the above considerations, I find that the individual has resolved the Criterion J concerns set out in the notification letter.

B. Criterion H

I do not find that the concerns regarding the individual's gambling disorder have been resolved. The consultant psychiatrist maintained his original diagnosis with respect to this issue. Both the individual's mother and father agreed that the individual has had a gambling problem. The individual himself realizes that he needs some treatment for this disorder. He has taken some steps towards rehabilitation, including abstinence from gambling and attending several GA meetings. He has also signed up for other gambling therapy sponsored by the local Veterans' Administration. However, as indicated by the DOE consultant psychiatrist, the individual needs one year of abstinence and therapy, and as of the time of the hearing he had had only approximately two months of rehabilitation. Accordingly, the Criterion H concern has not been mitigated.

C. Criterion F

I find that the individual has not resolved the concern regarding his falsification at the PSI regarding his gambling. I am not convinced that the individual intentionally falsified at his PSI. I believe, as the consultant psychiatrist testified, that the individual was experiencing some denial about his gambling during the PSI, and that the consultant psychiatrist was able to ask questions in such a way as to elicit more truthful answers from the individual. This does not mean that the concern regarding the individual's candor is resolved. However, I do believe that as the individual resolves his gambling disorder, concerns regarding his ability to be truthful will also be mitigated. In my opinion, the Criterion F concern has not been mitigated at this time.

V. CONCLUSION

As the foregoing indicates, I find that the individual has resolved the Criterion J concern. I find that he has not resolved the Criteria H and F security concerns. It is therefore my decision that this individual's suspended access authorization should not be restored.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: September 24, 2007